In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-436

WALTER V. MEDENICA, A/K/A VOJESLAV MEDENICA,
PETITIONER

v.

HOWARD H. CALLAWAY, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the administrative determination that he is not entitled to veterans' preference status is arbitrary and capricious.

Petitioner, an employee of the National Aeronautics and Space Administration, claims that in June 1945, when he was a Yugoslav citizen living in France, he was accepted as an enlistee in the United States Army Air Force, 81st Airdrome Squadron, in which capacity he served until early 1946. In 1971 he filed a request for veterans' preference status, based on that alleged service with the Army Air Force. By letter dated January 26, 1971, NASA denied the application on the ground that petitioner had failed to submit any documentation to support his claim. On appeal to

the Board of Appeals and Review, petitioner submitted a Class A pass allegedly issued to him as an enlistee. The Board denied the application, stating that the pass was not evidence of active duty status and that there was no government record of petitioner's alleged service.

In November 1972, petitioner submitted a Petition for Declaration of Veteran's Status to the Adjutant General of the United States Army. Petitioner enclosed photographs of himself in military uniform, a copy of the Class A pass, and affidavits by three former members of the 81st Airdrome Squadron and a former member of the Royal Yugoslav Army. Each affidavit stated only that the affiant "was under the impression" that petitioner had served in the United States armed services or that "to the best of [the affiant's] knowledge" petitioner had so served. Petitioner was notified by the Chief of the Army Reference Branch of the National Personnel Record Center in St. Louis, Missouri, that there was no record of his alleged service in the armed forces.

Petitioner then filed a suit against the Secretary of the Army; that was subsequently dismissed without prejudice to permit petitioner to exhaust his administrative remedies by filing a petition with the Board for Correction of Military Records. The Board denied petitioner's application in November 1973 for lack of sufficient evidence, and petitioner then instituted this action in the United States District Court for the Northern District of Alabama. The district court granted the government's motion for summary judgment, holding that the administrative determination had not been "arbitrary, capricious or erroneous in law" (Pet. App. 5a). The court of appeals affirmed *per curiam* without opinion (Pet. App. 1a).

This case presents no issue warranting review by this Court. The determination by the Board for the Correction of Military Records must be upheld unless it is "arbitrary and capricious." *Peppers* v. *United States Army*, 479 F.2d 79, 84 (C.A. 4); *Sanford* v. *United States*, 399 F.2d 693 (C.A. 9). Petitioner presented no documentation showing either an enlistment or a discharge from the armed forces, and an examination at the military record center revealed no record of his alleged enlistment. The affidavits on which petitioner relies show only that the affiants and petitioner believed that petitioner was a member of the United States armed forces. Their unsubstantiated belief does not warrant reversal of the decisions below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

DOJ-1974-12